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Compensation in Cases of Mass Atrocities at the International Court of Justice and the International Criminal Court

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Abstract

Within their different mandates, the ICJ and the ICC have decided on compensation for mass atrocities, including the same factual scenarios and related dual state/individual responsibility. However, no publication has examined these developments jointly and comparatively. Thus, this article seeks to determine how both courts are and should be developing compensation jurisprudence on mass atrocity cases. This article suggests that these two courts should construe a coherent, principle-based, and human rights-oriented international law of compensation for mass atrocities. Despite the differences in the compensation law and practice of the ICJ and the ICC, there are common elements such as the violation of an international obligation (wrongful act/international crime), damages, and the causal link between them. There are also some similarities concerning compensation goals, proof matters, and damage valuation. Both courts can and should conduct an adapted use of each other's jurisprudence, considering their different mandates rather than doing so mechanically.

Keywords

compensation – mass atrocities – International Court of Justice – International Criminal Court – reparations

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1 Introduction

Mass atrocities are serious violations of human rights and international humanitarian law ("IHL"); constitute international crimes (genocide, crimes against humanity, war crimes); are perpetrated on a large scale or systematically; affect large numbers of victims; and trigger State responsibility and individual criminal liability.[1] As the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC-ARSIWA")[2] and authors[3] have explained, compensation is a fundamental reparation modality that seeks to redress economically assessable harms inflicted on States or individuals resulting from mass atrocities, and compensation has been claimed by States or persons against States or convicted individuals at international courts.

Within their different mandates, the International Court of Justice ("ICJ") and the International Criminal Court ("ICC") have decided on compensation in mass atrocity cases. While the ICC has rendered reparation orders for mass atrocities in four cases since 2012,[4] the ICJ rendered its first compensation judgment (reparations) concerning mass atrocities in *Armed Activities on the Territory of the Congo*.[5] Other than *Armed Activities*, the ICJ and ICC have not invoked each other in their respective compensation jurisprudence.

1 Heidy Rombouts et al., "The Right to Reparations for Victims of Gross and Systematic Violations of Human Rights", in K. de Feyter et al. (eds.), *Out of the Ashes – Reparation for victims of gross and systematic human rights violations* (2005), 309, 349–352; UN-Office on Genocide Prevention, "Framework of Analysis for Atrocity Crimes" (2014); William Schabas, "Atrocity Crimes", in W. Schabas (ed.), *The Cambridge Companion to International Criminal Law* (2016), 199–205.

2 ILC, *Yearbook of the International Law Commission*, 2001, Vol. II(2), 98–105.

3 E.g., Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (2005), 537–555; Cherif Bassiouni, "International Recognition of Victims' Rights", 6 *Human Rights Law Review* (*HRLR*) (2006), 203–279; Dinah Shelton, *Remedies in International Human Rights Law* (3rd edition, 2015); Carla Ferstman and Mariana Goetz (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (2nd edition, 2020); Christian Correa et al., *Reparation for Victims of Armed Conflicts* (2020).

4 *Infra* 2.1.

5 *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), *Judgment* (*Reparations*) *of 9 February 2022*.

Authors have examined the reparation/compensation law and practice of the ICJ[6] and ICC[7] *separately*. However, no academic publication has examined these developments *jointly* and *comparatively*. This gap should be filled for several reasons. First, there are common compensation elements and notions, namely a common grammar, that suggest cross-fertilization across international courts in jurisprudence on compensation for mass atrocities with due respect for their different mandates. Second, international human rights law ("IHRL") on compensation has been to a larger or lesser extent present in the law and practice of both courts. Third, there may be dual State responsibility and individual criminal liability for the same/overlapping mass atrocities, which underlies related compensation judicial proceedings and awards. Fourth, the ICJ and ICC have ordered compensation in mass atrocity cases related to the Democratic Republic of Congo ("DRC") and are examining mass atrocities related to the Rohingya crisis (Myanmar) and the Russian invasion of Ukraine. Fifth, the ICJ has started invoking the ICC's reparation jurisprudence as *Armed Activities* shows. Finally, the ICJ and ICC are the only permanent global courts that may exercise jurisdiction over mass atrocities.

Against this background, the main research question herein is to determine how the ICJ and the ICC are and/or should be developing compensation jurisprudence on mass atrocity cases. This article suggests that these courts should construe a coherent, principle-based, and human rights-oriented international law of compensation for mass atrocities.

To answer the main research question, this article has two sections. Section 2 normatively discusses: compensation at both courts, the need for a coherent international law of compensation for mass atrocities, the advisability of a principle-based international law of compensation for mass atrocities, and IHRL at the ICJ and ICC. Section 3 analyses general and specific aspects of

6 E.g., Conor McCarthy, "Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at The International Court of Justice", in Ferstman and Goetz, *supra* note 3, 350–378; Gentian Zyberi, "The International Court of Justice and applied forms of reparation for international human rights and humanitarian law violations", 7 *Utrecht Law Review* (2011), 204–215; Victor Stoica, *Remedies before the International Court of Justice* (2021); Diane Desierto, "The International Court of Justice's 2022 Reparations Judgment in DRC v. Uganda", *EJIL: Talk!*, 14 February 2022, https://www.ejiltalk.org/the-international-court-of-justices-2022-reparations-judgment-in-drc-v-uganda-a-new-methodology-for-human-rights-in-inter-state-disputes/.

7 E.g., Eva Dwertmann, *The Reparation System of the International Criminal Court* (2010); Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (2012); Miriam Cohen, *Realizing Reparative Justice for International Crimes* (2020), 75–149; Luke Moffett and Clara Sandoval, "Tilting at Windmills – Reparations and the International Criminal Court", 34 *Leiden Journal of International Law* (2021), 749–769.

compensation for mass atrocities at both courts. Therein dual State and individual responsibility for mass atrocities, common factual scenarios, compensation elements, compensation goal(s), matters of proof, and valuation of damages are examined.

2 Normative Aspects

2.1 *Compensation at Both Courts*

Under the ICJ Statute (Article 36(2)(d)), the ICJ can decide on inter-State disputes concerning "the nature or extent of the reparation to be made for the breach of an international obligation". Thus, upon determining the respondent State's responsibility, the ICJ can order compensation for the applicant State in inter-State contentious proceedings.[8] It has developed important compensation jurisprudence, invoking, *inter alia*, the ILC-ARSIWA[9] and *Chorzów Factory* where the Permanent Court of International Justice ("PCIJ") seminally established that "the breach of an engagement involves an obligation to make reparation in an adequate form" and the:

> principle contained in the actual notion of an illegal act [...] is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.[10]

The ICJ first awarded compensation in *Corfu Channel* (1949).[11] In *Genocide Convention* (2007), it rejected compensation claims;[12] yet, it rendered its first compensation judgment (reparations) in *Diallo* (2012),[13] a human rights case. As Judge Greenwood stated, although Guinea filed the action based on diplomatic protection, "the case is in substance about the human rights of Diallo".[14]

8 Christian Tomuschat, "Article 36", in A. Zimmermann, et al. (eds.), *The Statute of the International Court of Justice – A Commentary* (3rd edition, 2019), 712, 740–741.

9 ILC, *supra* note 2, 26.

10 *Factory at Chorzów* (*Claim for Indemnity – Jurisdiction*), *Judgment of 26 July 1927, P.C.I.J. Series A, No. 9*, p. 21.

11 *Corfu Channel* (*United Kingdom v. Albania*), *Merits, Judgment, I.C.J. Reports 1949*, p. 4, 36.

12 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), *Judgment, I.C.J. Reports 2007*, pp. 233–234, paras. 462–463.

13 *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), *Compensation, Judgment, I.C.J. Reports 2012*, p. 324.

14 *Ibid.*, Declaration of Judge Greenwood, p. 391, para. 1.

In *Certain Activities* (2018), the ICJ applied the *Diallo* jurisprudence to environmental damages.[15]

Nevertheless, the ICJ has ordered compensation for mass atrocities only in *Armed Activities* (2022).[16] It overall relied on its previous compensation jurisprudence adapted to mass atrocities. Therefore, the ICJ can develop compensation jurisprudence applicable to different fields. Yet, *Armed Activities* evidences challenges of applying general compensatory principles to mass atrocity cases, which suggests the need for the ICJ to partially adapt its general compensation jurisprudence.

The ICC can order compensation for victims of international crimes of which the accused was found guilty. Under the ICC Statute (Article 75): "1. The Court shall establish principles relating to [...] compensation [...] 2. The Court may make an order directly against a convicted person specifying appropriate reparations to [...] victims, including [...] compensation". In *Lubanga*, the ICC Trial Chamber ("TCh")[17] and ICC Appeals Chamber ("ACh")[18] identified the compensation principles. They invoked IHRL, especially the UN General Assembly Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[19] ("UN-Reparation Principles") and regional human rights jurisprudence. The ICC applied those *Lubanga* jurisprudential principles in *Katanga*, *Al-Mahdi*, and *Ntaganda* and quantified the harm inflicted.[20]

At the ICC, victims normally request compensation. Unlike in *Lubanga*, the ICC granted compensation requests in *Katanga*, *Al-Mahdi*, and *Ntaganda*.[21] According to the ICC, compensation can be granted when: harm is quantifiable, compensation would be appropriate and proportionate, and there are funds that exist.[22] It has also noted that: whereas monetary reparations are compensatory, compensation alone may be insufficient to redress certain

15 *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*), *Compensation, Judgment, I.C.J. Reports 2018*, p. 15.

16 *Armed Activities*, *supra* note 5.

17 *Lubanga*, ICC-01/04-01/06-2904, Decision establishing the principles and procedures to be applied to reparations, TCh-I, 7 August 2012.

18 *Lubanga*, ICC-01/04-01/06-3129-AnxA, Order for Reparations, ACh, 3 March 2015.

19 UN Doc. A/RES/60/147 (2005).

20 *Katanga*, ICC-01/04-01/07-3728-tENG, Order for Reparations, TCh-II, 24 March 2017; *Al-Mahdi*, ICC-01/12-01/15-236, Reparations Order, TCh-VIII, 17 August 2017; *Ntaganda*, ICC-01/04-02/06-2659, Reparations Order, TCh-VI, 8 March 2021.

21 *Katanga*, *supra* note 20, p. 118; *Al-Mahdi*, *supra* note 20, p. 60; *Ntaganda*, *supra* note 20, p. 97.

22 *Lubanga*, *supra* note 17, para. 226.

types of harm, compensation needs a broad application that encompasses all damages, and collective awards may include individual monetary payments.[23]

Unlike at the ICJ, ICC reparation orders have generally combined compensation with other reparation modalities: restitution, rehabilitation, satisfaction, and/or guarantees of non-repetition.[24] Regarding mass atrocities, awards should generally combine these modalities to adequately redress harm as UN-Reparation Principles 15–23 indicate and as ICJ Judges Cançado Trindade[25] and Yusuf[26] have highlighted. Due to the nature of mass atrocities, restitution of the *status quo ante* is extremely challenging;[27] however, some restitution measures (property restitution, etc.) can/should be considered.[28] Hence, compensation and other reparation modalities are needed in mass atrocity cases. Yet, compensation is usually the reparation modality that is the most often sought in international (criminal) law practice.[29] As the ICC's practice shows, compensation/other reparation modalities can be granted as individual and collective awards.

Unlike the ICJ, the ICC's reparation system includes a specialized body: the Trust Fund for Victims ("ICC-TFV"),[30] which has been central to implementing ICC awards (including compensation) through State contributions/donations, as, so far, all of the convicted lacked funds. This further suggests the need to jointly examine the ICC and ICJ compensation regimes concerning the same/overlapping mass atrocities: the responsible State is (generally) expected to be able to pay the ICJ award to the complainant State which could then redistribute the sums amongst victims facing serious problems of ICC-award implementation. The draft ICC Statute originally enabled the ICC to order reparations against a State if the convicted was a State officer and could not afford reparations.[31]

States that are beneficiaries of ICJ awards should at least partially redistribute the compensation amongst the mass atrocity victims, as occurs *mutatis mutandis* in inter-State cases at the European Court of Human

23 E.g., *Ntaganda*, *supra* note 20, paras. 84–86.
24 E.g., *ibid.*, paras. 197–213.
25 *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), *Order of 6 December 2016, I.C.J. Reports 2016*, p. 1135, Separate Opinion of Judge Cançado Trindade, pp. 1143–1144, paras. 24–27.
26 *Armed Activities*, *supra* note 5, Separate Opinion of Judge Yusuf, para. 43.
27 ILC, *supra* note 2, pp. 96–98, Article 35.
28 *Ibid.*, pp. 97–98; *Lubanga*, *supra* note 18, paras. 35–36.
29 ILC, *supra* note 2, 99; McCarthy, *supra* note 7, 162.
30 ICC Statute, Article 79.
31 A/CONF.183/2/Add.1, 14 April 1998, 116–118.

Rights ("ECtHR").[32] Judge Cançado Trindade powerfully remarked that individuals are, properly speaking, the ultimate subjects and beneficiaries of reparations in cases concerning human rights violations, although reparations are formally due to States at the ICJ.[33] Under UN-Reparation Principle 16, States should provide reparations to victims who cannot obtain them from liable actors. Pursuant to the ILC Draft Articles on Prevention and Punishment of Crimes Against Humanity, liable States shall provide reparations (including compensation) to victims.[34]

2.2 *A Coherent International Law of Compensation for Mass Atrocities*

The ICJ and ICC can decisively shape the international law of compensation for mass atrocities amidst fragmentation and diversification in international law. The ILC-Study Group on Fragmentation of International Law acknowledged that: the proliferation of international courts raises concerns about deviating jurisprudence ("international law's diversification may threaten its coherence"); and fragmentation moves international law towards pluralism.[35] However, it remarked that this happens "by constantly using the resources of general international law".[36]

Concerning reparations (compensation included), the said group recognised that a fall-back to general remedies may be needed.[37] Compensation is a key legal category in international and national law and courts. International courts can order compensation when an international law rule is breached. Thus, a coherent or consistent international law of compensation in mass atrocity cases is advisable or required.

As Higgins highlighted, coherence is advisable in the international legal order to protect "core predictability that is essential if law is to perform its functions in society".[38] States and individuals can then make informed choices and have disputes settled, respecting the rule of law.[39] Amidst diverse international courts, some degree of unity is necessary as Judge Greenwood indicated in *Diallo*: "International law […] is a single, unified system of law and each

32 *Cyprus v. Turkey*, Judgment (just satisfaction), 25781/94, 12 May 2014.

33 *Diallo*, *supra* note 13, Judge Cançado Trindade's Separate Opinion, pp. 362–384, paras. 41–101; Judge Cançado Trindade, *supra* note 25, p. 1142, para. 20.

34 ILC, *Yearbook of the International Law Commission*, 2019, Vol. II(2), Article 12(3).

35 ILC, "Fragmentation of International Law – Difficulties Arising from the Diversification and Expansion of International Law", UN Doc. A/CN.4/L.682 (2006), paras. 489, 492.

36 *Ibid.*, para. 492.

37 *Ibid.*, para. 149.

38 Rosalyn Higgins, *Problems and Process – International Law and How We Use It* (1994), 50.

39 Philippa Webb, *International Judicial Integration and Fragmentation* (2013), 5.

international court can, and should, draw on the jurisprudence of other international courts […], even though it is not bound necessarily to come to the same conclusions".[40] Article 21 of the ICC Statute ("Applicable law") demonstrates that a coherent international law is advisable/feasible since this article seeks to harmonize sources from different legal branches applicable by the ICC.[41]

For the stability of the fragile international legal system, it is indispensable to have judicial integration and a comprehensive approach to dispute settlement under which similar factual scenarios and similar legal matters are treated consistently and disparities in treatment are justified and explained.[42] Coherence and unity or judicial integration may help to efficiently realize the goals of international courts,[43] and support specific international law regimes and international law as a whole, legitimizing international courts' public authority.[44] Norm support involving interpretation, application, and development of international law/international dispute settlement may be strengthened.[45] Coherence or consistency belongs to the international rule of law, helps to solve deficits in the international legal order, and serves to assess international courts.[46]

The international law of compensation for mass atrocities is based on certain grounds and elements applicable across international courts, including a violation of an international obligation, damages, and the causal link between violation and damages.[47] This common "grammar" requires increasing efforts to develop a coherent international law of compensation for mass atrocities across international courts, certainly also in consideration of each court's differentiated mandate. This occurs in a diverse international judiciary.[48] Different international law fields at diverse supranational courts may fragment the unitary character of international law into self-contained

40 Judge Greenwood's Declaration, *supra* note 14, p. 394, para. 8.

41 Flavia Lattanzi, "Introduction", in Larissa van-den-Herik and Carsten Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (2012), 1, 18.

42 Webb, *supra* note 39, 5.

43 Yuval Shany, *Assessing the Effectiveness of International Courts* (2014), 27–62.

44 *Ibid.*, 43–46.

45 *Ibid.*, 38–41.

46 Jan Klabbers et al., *The Constitutionalisation of International Law* (2009), 59–68, 135–142.

47 Shelton, *supra* note 3, 13–15, 278–284; McCarthy, *supra* note 6, 352–365; Correa et al., *supra* note 3, 55–59.

48 Freya Baetens (ed.), *Identity and Diversity on the International Bench – Who is the Judge?* (2020).

regimes.[49] Within their differentiated mandates, however, the ICJ and ICC can play an important role in construing a coherent international law of compensation for mass atrocities.

The ICJ can reinvigorate its role as the international community's main court:[50] it is the UN's main court,[51] and it could do this as a judicial policy.[52] Although no formal hierarchy exists among international courts,[53] the ICJ may play a central role in developing the international law of compensation for mass atrocities. This is because its jurisprudence has clarified international obligations, is highly respected across legal communities due to its generalist nature, and has respected the specialist competence of other international bodies.[54] The ICJ's jurisprudence is also compelling on general international law (principles and methods).[55] It provides international law with a centre of gravity, moving away from rigid inter-State perspectives that restrict legal developments.[56]

The ICJ has gradually changed its traditional reluctance to invoke the practice of other international courts and bodies. In *Armed Activities*, it invoked international bodies' compensation case law, particularly the Eritrea-Ethiopia Claims Commission's ("EECC") practice.[57] In fact, the ICJ referred to the ICC's reparation/compensation jurisprudence,[58] which shows the potential for a large(r) "cross-fertilization"[59] on compensation case law between the two courts. Regarding general legal categories such as compensation, the differences between the two courts should not prevent cross-fertilization. Thus, the *Armed Activities* reparation judgment illustrates how the ICJ can exercise and further strengthen its role in developing the international law of compensation

49 Mads Andenas, "Reassertion and Transformation – From Fragmentation to Convergence in International Law", 46 *Georgetown Journal of International Law* (2015), 685, 686.

50 Pierre-Marie Dupuy, "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice", 31 *New York University Journal of International Law and Policy* (1999), 791, 801–802.

51 UN Charter, Article 92.

52 Georges Abi-Saab, "Fragmentation or Unification", 31 *New York University Journal of International Law and Policy* (1999), 919, 929.

53 Andenas, *supra* note 49, 690.

54 *Ibid.*, 688–690.

55 *Ibid.*, 689; Gilbert Guillaume, "Methods and Practice of Treaty Interpretation by the International Court of Justice", in Giorgio Sacerdoti et al. (eds.), *The WTO at Ten* (2006), 465, 472–473; Peter Tomka, "Custom and the International Court of Justice", 12 *The Law and Practice of International Courts and Tribunals* (2013), 195–216.

56 Andenas, *supra* note 49, 690–691.

57 *Armed Activities*, *supra* note 5, paras. 107–110, 123, 164, 189, 214, 237, 376, 382–384, 392.

58 *Ibid.*, paras. 123, 158–163, 191–192, 202–205, 249.

59 Jean D'Aspremont, *Formalism and the Sources of International Law* (2011), 205.

for mass atrocities by, *inter alia*, invoking the case law of other international bodies. The ICJ's compensation/reparation judgments can demonstrate that the Court has provided itself with the tools to enhance the unity and coherence of international law.[60]

Concerning the ICC, its law and practice on compensation/reparation have been replicated or invoked, to a larger or lesser extent and with adaptations, in the law and practice of hybrid criminal courts dealing with mass atrocities, including the Extraordinary Chambers in the Courts of Cambodia,[61] the Extraordinary African Chambers in Senegalese Courts,[62] and the Central African Republic's Special Criminal Court.[63] The same applies to the prospective African Court of Justice and Human and Peoples' Rights,[64] which will exercise jurisdiction over, *inter alia*, international crimes. Thus, the ICC's compensation law and practice have already influenced important developments towards a (more) coherent international law of compensation law in mass atrocity cases.

2.3 *A Principle-Based International Law of Compensation in Mass Atrocity Cases*

Despite the differences between the ICJ's and ICC's compensation regimes, the obligation to provide compensation to redress harm resulting from a violation of an international law rule corresponds to the application of "the general principles of law recognized by civilized nations" under Article 38(1)(c) of the ICJ Statute.[65] The ICJ[66] has continuously invoked *Chorzów Factory*, where the PCIJ found that the obligation of reparation is "a principle of international law".[67] The ICC has also invoked it,[68] but infrequently.

A principle-based international law of compensation in mass atrocity cases at the ICJ and ICC may serve the gap-filling function of the general principles of international law. Such function[69] enhances the "systemic fabric" of

60 See Andenas, *supra* note 49, 733.
61 E.g., *Case 001*, Appeals Judgment, 3 February 2012.
62 *Habré*, Reparation Order, 29 July 2016.
63 SCC Statute, Article 129.
64 ACtJHPR Statute, Article 45.
65 See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), 233–241; Stoica, *supra* note 6, 108–144.
66 E.g., *Diallo*, *supra* note 13, p. 11, para. 13; *Armed Activities*, *supra* note 5, para. 100.
67 *Factory at Chorzów, Merits, Judgment of 13 September 1928, P.C.I.J. Series A, No. 17*, pp. 23–24.
68 *Katanga*, ICC-01/04-01/07-3778-Red, Judgment on appeals against the "Order for Reparations", ACh, 8 March 2018, para. 178.
69 See Malcolm Shaw, *International Law* (2021), 82–83.

international law.[70] Even if there is no legal gap, such principles play a prominent role in interpreting and applying treaties and customary rules.[71] General principles of law are key for cohesion because they are manifestations of a central cohesive force, reflecting and reinforcing the systemic nature of the international system.[72] They closely relate to the need for completeness of any legal system,[73] and may help to address matters that treaties or customary rules are not built to handle.[74] Any international situation can be determined as a legal matter, although there is not always necessarily a concrete applicable rule.[75]

In international courts, general principles of law may also be used for intra-systemic convergence and as inter-systemic coherence tools.[76] The ICJ as a general jurisdiction court is in a privileged position to evaluate the existence and scope of such principles.[77] General principles of law evidence that the ICJ belongs to "the family of tribunals" that maintain the rule of law in dispute settlement.[78]

The ICC is another key member of the international judiciary. Article 21 of the ICC Statute, which is *mutatis mutandis* equivalent to Article 38 of the ICJ Statute, includes as subsidiary legal sources at the ICC: "principles [...] of international law, including the established principles of the international law of armed conflicts" (Article 21(1)(b)) that are similar to Article 38(1)(c) of the ICJ Statute; and "general principles of law derived by the Court from national laws" (Article 21(1)(c)) that mainly involve comparative (criminal) law.[79]

As indicated previously, the ICC has to establish compensation/reparation principles under Article 75(1) of the ICC Statute. It has arguably contributed to

70 Bruno Simma and Dirk Pulkowski, "Of Planets and the Universe – Self-contained Regimes in International Law", 17 *European Journal of International Law* (2006), 483, 529; Mads Andenas and Ludovica Chiusi, "Cohesion, Convergence and Coherence of International Law", in Mads Andenas et al. (eds.), *General Principles and the Coherence of International Law* (2019), 14.

71 Andenas and Chiusi, *supra* note 70, 14.

72 *Ibid.*, 10, 14.

73 Ian Brownlie, "Problems Concerning the Unity of International Law", in *International Law at the Time of its Codification* (1987), 154.

74 Cherif Bassiouni, "A Functional Approach to General Principles of Law", 11 *Michigan Journal of International Law* (1990), 768, 769.

75 Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, Volume 1 (1992), 13.

76 Andenas and Chiusi, *supra* note 70, 15, 20–21.

77 *Ibid.*, 19.

78 Vaughan Lowe, *International Law* (2007), 88.

79 William Schabas, *The International Criminal Court – A Commentary on the Rome Statute* (2016), 520; Antonio Cassese, *International Criminal Law* (2013), 15.

the international law of compensation for mass atrocities by identifying, construing, and applying reparation/compensation principles based on, *inter alia*, IHRL sources.[80] This enhances the coherence of the said compensatory field.

To strengthen the systemic integration of international law, Article 38(1)(c) should be read with Article 38(1)(d) of the ICJ Statute ("judicial decisions [...] as subsidiary means for the determination of rules of law").[81] A principle-based international law of compensation in mass atrocity cases at the ICJ and at the ICC, subject to adaptations, arguably involves "judicial dialogue". This means invoking the jurisprudence of other judicial bodies.[82]

Important dimensions of the international law of compensation in mass atrocity contexts can be found in the UN-Reparation Principles,[83] which the ICC has invoked in construing its reparation/compensation jurisprudential principles and beyond.[84] While the UN-Reparation Principles are not per se binding, they build on, are consistent with, or reflect binding international treaty/customary rules and legal principles on reparations regarding mass atrocities.[85] Besides the ICC, other supranational courts such as the African Court of Human and Peoples' Rights ("ACtHPR")[86] and the Extraordinary Cambodian Chambers[87] have invoked the UN-Reparation Principles. Moreover, the UN-Convention against Enforced Disappearance (Article 24) and the ILC-Crimes Against Humanity Articles (Article 12(3)) adopted the language of the UN-Reparation Principles. Adapted to its specific mandate, the ICJ should thus start using the UN-Reparation Principles in its mass atrocity-related compensation jurisprudence; and, indeed, Judges Cançado Trindade[88] and Yusuf[89] have invoked them.

80 *Lubanga*, *supra* note 18, paras. 1–52.

81 Mads Andenas and Johann Leiss, "The Systemic Relevance of 'Judicial Decisions' in Article 38 of the ICJ Statute", 77 *Heidelberg Journal of International Law* (2017), 907, 913–914.

82 *Ibid.*, 913.

83 Bassiouni, *supra* note 3, 265–275.

84 E.g., *Lubanga*, *supra* note 18.

85 Bassiouni, *supra* note 3; Theo van-Boven, "Victims' Rights to a Remedy and Reparation – the United Nations Principles and Guidelines", in Ferstman and Goetz, *supra* note 3, 15–37; Henckaerts and Doswald-Beck, *supra* note 3, 547–549.

86 *Beneficiaries of Zongo and Burkinabè Movement v. Burkina Faso* (Reparations), 5 June 2015, para. 47.

87 *Case 001*, *supra* note 61.

88 Judge Cançado Trindade, *supra* note 33, 368–369, paras. 53–56.

89 Judge Yusuf, *supra* note 26, para. 37.

2.4 *IHRL and the Compensation Jurisprudence of the Two Courts*

As Crawford suggested, human rights are a fundamental component of the international rule of law.[90] IHRL is present in the law and practice of diverse international courts,[91] and is a well-established standard to assess the legitimacy and effectiveness of the international judiciary.[92]

Expressing his agreement with Higgins, Crawford stated that, although the ICJ "is not a human rights court as such, it is fully engaged in the judicial protection of human rights".[93] This also applies *mutatis mutandis* to the ICC. Moreover, both the ICJ and the ICC have to a larger or lesser extent invoked IHRL when developing their compensation jurisprudence.[94]

Regarding the ICJ's jurisdiction and IHRL: i) it is a general jurisdiction court, namely, it can interpret and apply, *inter alia*, IHRL;[95] ii) some human rights treaties contain a compromise clause referring to the ICJ's jurisdiction for inter-State disputes;[96] iii) Article 38 of the ICJ Statute is the formal legal basis for the ICJ's engagement with IHRL as part of international law,[97] bringing IHRL treaties into the ICJ's substantive jurisdiction;[98] and iv) although the ICJ only deals with inter-State litigation, it is in Higgins' words "above all a court of international law [... that] has [...] become also a court concerned with human rights",[99] as increasingly the ICJ's inter-State cases[100] and advisory opinions[101] show. The ICJ's jurisdiction over IHRL cases is especially (but

90 James Crawford, "International Law and the Rule of Law", 24 *Adelaide Law Review* (2003), 1, 6–7.

91 Martin Scheinin (ed.), *Human Rights Norms in 'Other' International Courts* (2019).

92 Nienke Grossmann et al. (eds.), *Legitimacy and International Courts* (2018); Nobuo Hayashi and Cecilia Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (2017); Shany, *supra* note 43.

93 Rosalyn Higgins, *Themes and Theories* (2009), 654.

94 See also Gentian Zyberi, "The Interpretation and Development of International Human Rights Law by the International Court of Justice", in Scheinin, *supra* note 91, 28–61; Annika Jones, "Insights into an Emerging Relationship – Use of Human Rights Jurisprudence at the International Criminal Court", 16 *Human Rights Law Review* (2016), 701–729.

95 Martin Scheinin, "How and Why to Assess the Relevance of Human Rights Norms in 'Other' International Courts", in Scheinin, *supra* note 91, 11; Zyberi, *supra* note 94, 32.

96 E.g., Convention against Genocide, Article IX; Convention against Torture/Other Ill-treatments, Article 30(1); Convention against Racial Discrimination, Article 17(1); Convention against Enforced Disappearance, Article 42(1).

97 Başak Cali et al., "The International Court of Justice as an Integrator, Developer and Globaliser of International Human Rights Law", in Scheinin, *supra* note 91, 62, 65.

98 Scheinin, *supra* note 95, 10.

99 Rosalyn Higgins, "Human Rights in the International Court of Justice", 20 *Leiden Journal of International Law* (2007), 745, 746.

100 See, e.g., notes 5, 12, 137.

101 See, e.g., note 102.

not only) necessary concerning States not subject to a regional human rights court's jurisdiction (e.g., Myanmar) or States that are no longer or will no longer be subject to such jurisdiction (e.g., Russia). Concerning these States, the ICJ hence *mutatis mutandis* may *partially* fill these jurisdictional gaps, determining State responsibility for serious IHRL violations constitutive of mass atrocities and ordering compensation/reparations.

The ICJ has been traditionally reluctant to invoke "external" IHRL sources. Nevertheless, it has increasingly relied on these IHRL sources for interpretation and application of, *inter alia*, (human rights) treaties. The ICJ in its advisory opinion in the *Wall* case (2004) extensively invoked, *inter alia*, the UN-Human Rights Committee's ("HRC") practice for the first time.[102] Concerning its contentious jurisdiction, the ICJ's judgment (merits) in *Diallo* (2010) is a milestone in this process.

Regarding *compensation* jurisprudence, the ICJ in *Diallo* invoked IHRL considerably, in particular the jurisprudence of the ECtHR and Inter-American Court of Human Rights ("IACtHR") and, to a lesser extent, the case law of the HRC and African Commission on Human and Peoples' Rights ("ACmHPR"), with an aim to identifying general principles governing compensation concerning, *inter alia*, redressable damages and compensatory amounts based on equitable principles.[103] The ICJ importantly recalled in *Diallo* that "the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter's injury".[104] Furthermore, Judge Cançado Trindade highlighted that human rights jurisprudence "is noteworthy, and deserves particular attention for the consideration of the matter of the reparations due to victims of human rights violations".[105]

In the *Armed Activities* reparation judgment, the ICJ invoked, *inter alia*, its previous compensation jurisprudence, including *Diallo*.[106] Hence, it could be sustained that, in *Armed Activities*, the ICJ indirectly relied on IHRL. However, the ICJ barely invoked IHRL *directly*, making only scarce references to the practices of the UN-Committee against Torture and ACmHPR.[107] Thus, the ICJ ignored important IHRL sources, especially the UN-Reparation Principles and regional human rights jurisprudence. Although some commentators have

102 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, 179–180, paras. 109–112.

103 *Diallo*, *supra* note 13, pp. 331–344, paras. 13, 18, 24, 33, 40, 49, 56.

104 *Ibid.*, para. 57.

105 Judge Cançado Trindade, *supra* note 33, pp. 50–51, para. 60.

106 *Armed Activities*, *supra* note 5, paras. 93, 100–102, 115–117, 131, 148, 164, 382, 402.

107 *Ibid.*, para. 188.

seemingly missed the said deficit,[108] others have soundly called for considering other supranational bodies' practices on compensation for atrocities.[109]

This (virtual) lack of direct references to IHRL sources in *Armed Activities* is criticized herein because these sources concern compensation for mass atrocities committed in armed conflicts and other violent contexts. Indeed, three out of the six separate or dissenting opinions/declarations (Separate Opinions of Judges Robinson, Iwasawa, and Yusuf) to the *Armed Activities* reparation judgment invoked IHRL sources. Judge Yusuf even criticized the ICJ's State-centred approach to compensation.[110] Subject to adaptations rather than mechanical/automatic cross-fertilization, the ICJ should increasingly use IHRL to better construe its compensation jurisprudence in mass atrocity cases. Instead of a balanced reliance on IHRL, the ICJ in *Armed Activities* continuously invoked the EECC's practice, which was excessive or partially ill-founded.[111] Although the ICJ's use of external case law is a positive development, the Court still does not often invoke IHRL jurisprudence.[112]

Whereas the ICJ (like the EECC) involves inter-State litigation vis-à-vis IHRL, which primarily involves individual-versus-State dynamics, it is insufficient to largely disregard IHRL on compensation for mass atrocities. Compensation for mass atrocities has a common grammar, based on, *inter alia*, IHRL sources, and is applicable *mutatis mutandis* by diverse supranational courts. Moreover, as indicated, mass atrocities are gross human rights violations.

Unlike the ICJ Statute, the ICC Statute (Article 21(3)) explicitly establishes that the application and interpretation of the legal sources at the ICC "must be consistent with internationally recognized human rights". This is similar to constitutional provisions.[113] Additionally, the ICC shall subsidiarily apply "applicable treaties and the principles and rules of international law" (ICC Statute, Article 21(1)(b)), which includes IHRL. To a (much) larger extent than the ICJ, the ICC has continuously invoked IHRL (mainly the UN-Reparation Principles and the IACtHR's jurisprudence, which is the most robust reparation case law among supranational courts) to construe its compensation jurisprudence, including reparation principles (compensation included) tailored to

108 Ori Pomson, "The ICJ's Armed Activities Reparations Judgment", *Articles of War*, 16 February 2022, https://lieber.westpoint.edu/icj-armed-activities-reparations-judgment/.

109 Desierto, *supra* note 6.

110 Judge Yusuf, *supra* note 26, para. 37.

111 Desierto, *supra* note 6; Pomson, *supra* note 108.

112 Stoica, *supra* note 6, 158, 163.

113 Schabas, *supra* note 79, 530.

the ICC's mandate.[114] The ICC's reparation/compensation jurisprudence has additionally invoked the ECtHR's and ACmHPR's practices, regional human rights treaties, and soft-law human rights instruments.[115] Pursuant to IHRL, the ICC has acknowledged the "right of individuals to an effective remedy and to reparations".[116]

The ICC's reparation jurisprudence began invoking recently (2021) the practices of UN human rights treaty bodies and the ACtHPR's jurisprudence, but only with regard to reparation aspects/modalities other than compensation.[117] Nonetheless, the ICC's reparation/compensation jurisprudence has not used the compensation provisions of the UN-Conventions against Torture and Enforced Disappearance.

IHRL sources have been fundamental for the ICC to define terms only mentioned in ICC instruments, including "compensation" and elements thereof, such as "damage, loss and injury",[118] and the causal link between crimes and damages.[119] Additionally, the ICC has employed IHRL sources as a gap filler,[120] for example, to quantify damages. The Vienna Convention on the Law of Treaties governs the interpretation of the ICC Statute.[121] However, the ICC's compensation jurisprudence has not explicitly recognized human rights-oriented interpretation methods, including dynamic interpretation and "special nature",[122] or *pro-homine*. Nonetheless, special interpretative methods have been employed on occasion (e.g., the ICC's expansively interpreted reparation goal(s)).

114 E.g., *Lubanga*, *supra* note 18, paras. 15–19; *Ntaganda*, *supra* note 20, paras. 1, 29–42, 51, 83–87.

115 E.g., *Lubanga*, *supra* note 17, paras. 217–249; *Katanga*, *supra* note 68, para. 178; *Ntaganda*, *supra* note 20, paras. 4, 42–51.

116 *Lubanga*, *supra* note 17, para. 186.

117 *Ntaganda*, *supra* note 20, para. 88.

118 ICC Statute, Article 75(1).

119 ICC Rule of Procedure and Evidence 85(a).

120 Jones, *supra* note 94, 720–721.

121 *DRC-Situation*, ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review, ACh, 13 July 2006, para. 33.

122 Carsten Stahn and Larissa Van-den-Herik, "'Fragmentation', Diversification and '3D' Legal Pluralism – International Criminal Law as the Jack-in-the-Box?", in Van-den-Herik and Stahn, *supra* note 41, 69.

3 Compensation for Mass Atrocities at Both Courts: Framework and Specific Aspects

3.1 *Duality of State Responsibility and Individual Criminal Responsibility*

Judge Cançado Trindade referred to "breach and reparation conforming an indissoluble whole".[123] A pivotal concept underlying compensation at both the ICJ and the ICC is that, when State actors are involved, there is a duality of international State responsibility and individual criminal liability for serious international law violations/international crimes.[124]

Dual State and individual responsibility are expressly recognized in the ILC-ARSIWA (Article 58): "These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State". Complementarily, the ICC Statute (Article 25(4)) establishes that: "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law". The ICJ invoked this provision in *Genocide Convention* (*Bosnia and Herzegovina v. Serbia and Montenegro*) when it noted that the "duality of responsibility continues to be a constant feature of international law".[125] In this case, the ICJ invoked the jurisprudence and findings of the International Criminal Tribunal for the former Yugoslavia ("ICTY").[126]

In *Armed Activities*, the DRC's request for criminal proceedings (satisfaction) was rejected since Uganda was already obligated to prosecute atrocities under IHL treaties.[127] However, this could have enhanced the determination of criminal liability, while complementing and reinforcing State responsibility for the same mass atrocities. Judge Yusuf soundly suggested that the ICJ could have ordered non-pecuniary satisfaction, "without necessarily altering the interstate nature of the proceedings".[128]

Therefore, facts triggering individual criminal responsibility also may lead to State responsibility. This stems from a dual State and individual responsibility for the same/overlapping mass atrocities when States are involved by action or omission.[129] Both States and individuals can be responsible for mass

123 Judge Cançado Trindade, *supra* note 25, p. 1139.
124 See ILC, *supra* note 2, 142–143; Cançado Trindade, *International Law for Humankind* (2010), 367–374.
125 *Genocide Convention*, *supra* note 12, p. 116, para. 173.
126 *Ibid.*, pp. 86–235, paras. 195–465.
127 *Armed Activities*, *supra* note 5, para. 390.
128 Judge Yusuf, *supra* note 26, para. 43.
129 ILC, *supra* note 2, 142–143.

atrocities and are obligated to redress the harm inflicted.[130] Hence, the ICJ, in its (compensation) jurisprudence on mass atrocities, should start considering the ILC-Crimes Against Humanity Articles, which contain the definition of crimes against humanity from the ICC Statute, include compensation/reparation provisions, and mention the ICJ for inter-State disputes.[131] Indeed, Judge Yusuf has already invoked them.[132]

According to *Chorzów Factory* and the ILC-ARSIWA (Article 31), the violation of primary rules causes a secondary obligation consisting of a reparation provision, with compensation included.[133] Pursuant to the ICC Statute (Article 75(6)), "Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law". As the ICC has established, the convicted person's liability for reparations shall be proportional to inflicted harms, whereas State responsibility is irrelevant to the determination of the convicted person's liability, and ICC reparations "do not interfere with the responsibility of States to address the harms suffered and award reparations to victims [...] under other treaties or national law".[134] Despite invoking the IACtHR's case law, the ICC has appropriately remarked that it determines individual criminal responsibility rather than State liability.[135]

At the ICJ, the injured State may bring compensation claims. Non-injured States may invoke State responsibility for serious breaches of multilateral treaty obligations or *erga omnes partes* obligations affecting collective interests and request reparations for the injured State or for the beneficiaries of the obligation that has been breached.[136] For example, in *Genocide Convention* (*The Gambia v. Myanmar*), which concerns the alleged genocide against the Rohingya, the ICJ determined that *all* the States Parties to the Genocide Convention share a common interest to prevent and punish genocide and, thus, The Gambia has *prima facie* standing to submit its dispute with Myanmar to the Court.[137]

130 Correa et al., *supra* note 3.
131 ILC, *supra* note 34, Articles 1, 12(3), 15.
132 Judge Yusuf, *supra* note 26, para. 39.
133 *Chorzów*, *supra* note 10, p. 21; ILC, *supra* note 2, Article 31.
134 *Ntaganda*, *supra* note 20, paras. 96, 102.
135 *Katanga*, *supra* note 20, footnote 102.
136 ILC, *supra* note 2, Article 48.
137 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), *Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 3, 17–18, paras. 41–42.

3.2 *Deciding on Mass Atrocities in Overlapping or the Same Scenarios*

Mass atrocity scenarios in the DRC, Georgia, Myanmar, and Ukraine have led to parallel proceedings before the ICJ and ICC. Only the DRC-related mass atrocities have so far resulted in ICJ and ICC awards, including compensation. In pre-award DRC-related jurisprudence, the ICC considered the ICJ's *Armed Activities* (merits) judgment, as both courts exercise jurisdiction over overlapping armed conflict(s). This occasioned the strengthening of judicial integration.[138] By invoking the ICJ's jurisprudence/findings,[139] the ICC considered Uganda to be an occupying power in Ituri (DRC) and recognised the situation to be an international conflict.[140] The ICC adopted the ICTY's overall control test when categorising the conflict; however, the ICC indicated that this test does not concern State responsibility under the ICJ's jurisprudence.[141]

The DRC-related factual overlap was partial. While *Armed Activities* involved an international conflict (DRC v. Uganda), the DRC-related ICC cases concerned internal conflicts between State and non-State groups. Despite distinguishing this, the ICC used the ICJ's factual and legal findings, accepting that international and internal conflicts may coexist.[142] The ICC followed the ICJ's definition of territorial occupation, acknowledging the evidence of Ugandan direct intervention that internationalized the conflict; however, the ICC focused only on the *internal* conflict under its jurisdiction.[143]

Therefore, the ICJ and ICC examined events and evidence stemming from DRC-related concurrent/overlapping conflicts. Mass atrocities attributed to Lubanga and others determined the ICC's focus on the internal conflicts. Nevertheless, these ICC cases fall within the broader ICC-*DRC Situation* and therefore new cases might involve the DRC v. Uganda international conflict.

In *Armed Activities* (reparations), the ICJ ordered Uganda to pay compensation for damages caused by violations of Uganda's international obligations,[144] including mass IHL and human rights violations committed in the DRC.[145] It invoked the practices of international bodies that determined compensation/

138 Webb, *supra* note 39, 137.

139 *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), *Judgment, I.C.J. Reports 2005*, p. 168, 280, para. 345(1).

140 *Lubanga*, ICC-01/04-01/06-803-tEN, Decision on Confirmation of Charges, Pre-TCh-I, 29 January 2007, paras. 212–220; *Katanga/Ngudjolo-Chui*, ICC-01/04-01/07-717, Decision on Confirmation of Charges, Pre-TCh-I, 30 September 2008, para. 240.

141 *Lubanga*, *supra* note 140, para. 210.

142 *Lubanga*, ICC-01/04-01/06-2842, Judgment, TCh-I, 14 March 2012, paras. 540, 563; *Katanga*, ICC-01/04-01/07-3436-tENG, Judgment, TCh-II, 7 March 2014, para. 1206.

143 *Lubanga*, *supra* note 142, paras. 541–564; *Katanga*, *supra* note 142, paras. 1205–1228.

144 *Armed Activities*, *supra* note 5, para. 409.

145 *Ibid.*, paras. 73–84.

other reparation modalities concerning mass atrocities during conflicts, including the ICC's DRC-related reparation jurisprudence.[146] The ICJ considered the ICC's reparation orders in DRC-related cases when discussing particular compensation aspects, such as the determination of harm and types thereof, harm valuation, and evidence.[147]

As for the partial overlap between *Georgia v. Russia* (ICJ) and the ICC-*Georgia Situation*, the ICC Prosecutor is investigating alleged crimes against humanity and war crimes against ethnic Georgians allegedly perpetrated by South Ossetian forces under Russian overall control before and after Russia's direct intervention in the conflict in and around South Ossetia (2008).[148] This may lead to ICC cases and compensation. *Georgia v. Russia* involved Georgian claims of alleged ethnic cleansing by Russian forces, alongside Russia's alleged unlawful use of force, in an inter-State dispute about Russia's obligations under the Convention on the Elimination of all Forms of Racial Discrimination ("CERD").[149] Nevertheless, the ICJ dismissed the case because the CERD preconditions for ICJ jurisdiction had not been fulfilled.[150]

Whereas the ICJ orders compensation against a respondent State for an applicant State, the ICC orders compensation against the convicted and for victims. Under the ICC Statute (Article 75(6)), "rights of victims under national or international law" are not prejudiced. This provides that ICC awards are not invoked to oppose claims at other courts.[151] Based on a *contrario sensu* interpretation, the ICC should however consider ICJ awards (and vice-versa) in overlapping or the same factual contexts. Although the ICC has found that national/international decisions do not affect victims' rights to reparations at the ICC, it has soundly concluded that it can consider other awards received by victims to avoid unfairness or discrimination.[152]

These considerations are important for ongoing mass atrocities involving the Rohingya people (Bangladesh/Myanmar) and the Russian invasion of Ukraine, triggering ICJ and ICC proceedings. While the ICJ deals with alleged

146 *Ibid.*, para. 123.

147 *Ibid.*, paras. 158–163, 191–192, 202–205, 237, 249.

148 *Situation in Georgia*, ICC-01/15-12, Decision on the Prosecutor's Request for Authorization of an Investigation, Pre-TCh-I, 27 January 2016.

149 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*), *Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, 117–121, paras. 106–114.

150 *Ibid.*, pp. 134–140, paras. 163–184.

151 Schabas, *supra* note 79, 1146.

152 *Lubanga*, *supra* note 18, para. 9.

Genocide Convention violations in both scenarios,[153] the ICC is investigating crimes against humanity against the Rohingya, and war crimes, crimes against humanity, and genocide in Ukraine.[154] Thus, this (uncoordinated) distribution of judicial work based on types of crimes and different liabilities may enable combined judicial efforts to cover larger dimensions of compensable harms through more comprehensive and mutually complementary compensatory/reparation measures if and when both courts render their awards in those cases. In order to maximize that this is so, both courts should coordinate their work through, *inter alia*, cross-fertilized jurisprudence and high-level meetings.

3.3 *Elements of Compensation*

In *Armed Activities*, the ICJ stated that it "may award compensation only when an injury is caused by the internationally wrongful act of a State",[155] which reflects the well-established elements of compensation: an international wrong, harm, and the causal link between them.[156] Serious violations of human rights and IHL generally constitute international crimes.[157] Pursuant to ILC-ARSIWA (Article 36(2)), "compensation shall cover any financially assessable damage including loss of profits insofar as it is established". Under UN-Reparation Principle 20, compensation "should be provided for any economic assessable damage".

In *Armed Activities*, the damages granted were categorized into damages to: persons, property, and natural resources.[158] Concerning damage to persons, the ICJ sub-categorized the damages by type of violation: loss of life, injuries, rape/sexual violence, recruitment/deployment of child soldiers, and forced displacement. Regarding loss of life, it considered material elements (losses of surviving successors, medical/burial costs, etc.) and non-material elements (psychological harm). Injuries to persons included non-material/psychological harm and injuries/mutilation. Unlike its *Diallo* compensation judgment and ICC awards, the ICJ in *Armed Activities* partially conflated two compensation

153 *Genocide Convention* (*The Gambia v. Myanmar*), *supra* note 137; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*).

154 *Situation in Bangladesh/Myanmar*; *Situation in Ukraine*.

155 *Armed Activities*, *supra* note 5, para. 93.

156 Shelton, *supra* note 3, 22–103; Correa et al., *supra* note 3, 55–59.

157 Theodor Meron, "International Law in the Age of Human Rights", 301 *Collected Courses of the Hague Academy of International Law* (2003), 9, 165; Lyal Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (1992).

158 *Armed Activities*, *supra* note 5, paras. 132–366.

elements: violations and damages, which was inaccurate. Judge Yusuf actually highlighted the importance of identifying damages as such.[159]

The causal nexus between a violation of an international obligation and damages caused by the responsible State is required in accordance with the ICJ's jurisprudence. For example, Bosnia-Herzegovina in *Genocide Convention* asked for compensation; however, the ICJ found that, because of the lack of a "causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide".[160] Nevertheless, this is criticized herein based on the victims' right to comprehensive reparations (beyond symbolic reparations) in mass atrocity cases. Other authors also criticized the ICJ for not ordering broader reparations.[161] Unlike the ICC, the ICTY lacked the power to order compensation for victims, which reinforces the criticism against the said ICJ decision as there was no international judicial compensation for mass atrocities committed in the Balkans.

At the ICC, international crimes trigger the obligation to compensate. Nonetheless, under the individual criminal liability principle, the ICC can order compensation against the convicted *only* for crimes leading to his/her conviction.[162] By invoking IHRL, it has determined that compensation includes all damages, including material, physical and psychological harm.[163] The ICC Statute (Article 75) mentions "damage, loss or injury", but without defining what these terms mean. The ICC clarified that harm "denotes hurt, injury, and damage", and "does not necessarily need to have been direct, but it must have been personal to the victim".[164] By considering IHRL, the ICC has found that, although financial quantification of some damages is unfeasible, compensation provides economic relief aimed at proportionately and appropriately redressing the harm inflicted.[165]

Like at the ICJ, pecuniary/material harm and non-pecuniary/moral damages are compensable at the ICC.[166] By using IHRL, the ICC has identified compensable damages, including: physical harm; moral/non-material damage resulting in mental, emotional suffering; material damage, including lost

159 Judge Yusuf, *supra* note 26, para. 31.
160 *Genocide Convention*, *supra* note 12, pp. 233–234, para. 462.
161 McCarthy, *supra* note 6, 364.
162 *Lubanga*, *supra* note 18, paras. 20–21.
163 *Ibid.*, para. 40.
164 *Ibid.*, para. 10.
165 *Lubanga*, *supra* note 17, para. 230.
166 Dwertmann, *supra* note 7, 135; McCarthy, *supra* note 7, 163.

earnings, opportunity to work, lost/damaged property, unpaid salaries; lost opportunities related to employment, education, social benefits, and personal legal rights; and medical and psychological/social assistance costs.[167] Most of these categories correspond *mutatis mutandis* to those in the ICJ's compensation jurisprudence. By invoking the IACtHR's jurisprudence, however, the ICC has gone further than the ICJ by considering: damage to the life plan ("lack of self-realisation of a person"), and transgenerational harm ("whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter").[168]

A sufficiently close causal link between the crimes of which the accused was convicted and harm inflicted is required at the ICC.[169] Unlike the ICJ, the ICC Rules of Procedure and Evidence (Rule 85(a)) require no *direct* legal causation standard.[170] The ICC determined that reparations, including compensation, are "awarded based on the harm suffered as a result of [...] crimes" within the ICC's jurisdiction and that the causal link between the crime and harm is determined on a case-by-case basis.[171] According to the ICC, the causation standard is a "'but/for' relationship between crime and harm", and the crimes triggering conviction "were the 'proximate cause' of the harm for which reparations are sought".[172] Regarding factual causation, the "proximate cause"/"but for" standard might not be completely appropriate for mass atrocities; however, this is sound for legal causation.[173]

While the ICJ has overall considered a "sufficiently direct and certain" causal link between the internationally wrongful act and the injury,[174] the ICC requires no *direct* causal link. Nevertheless, both courts acknowledge that the causal link required may change depending on the primary rule breached, the nature and extent of the injury, and/or case particularities.[175]

3.4 *The Goal(s) of Compensation*

Certain goal(s) of compensation can be identified in the ICJ's jurisprudence. By following *Chorzów Factory*, the ICJ has determined that reparations as much as possible shall: "wipe out all the consequences of the illegal act" and

167 *Lubanga*, *supra* note 18, para. 40.
168 *Ntaganda*, *supra* note 20, paras. 72–73.
169 Dwertmann, *supra* note 7, 142.
170 McCarthy, *supra* note 7, 150.
171 *Lubanga*, *supra* note 18, para. 11.
172 *Ibid.*, para. 59.
173 McCarthy, *supra* note 7, 155.
174 E.g., *Armed Activities*, *supra* note 5, para. 93.
175 *Ibid.*; *Lubanga*, *supra* note 18, para. 11.

"reestablish the situation which would, in all probability, have existed if that act had not been committed".[176] Hence, compensation generally pursues reparative and restorative justice.

The ICJ in *Armed Activities* established that compensation may be an appropriate reparation form, "particularly in those cases where restitution is materially impossible".[177] This corresponds to the concept that remedies seek to deliver compensatory or remedial justice which, in Shelton's words, rectifies "the wrong done [...] to correct injustice".[178] Thus, the ICJ has seemingly focused on reparative justice as the main goal of compensation. Conversely, it has excluded punitive goals: "reparation due to a State is compensatory in nature and should not have a punitive character".[179]

As the ICC has established, compensation and other reparation modalities endeavour to ensure that the convicted individual redresses the harm caused to victims and accounts for his/her acts,[180] i.e., remedial and restorative justice. It has been determined that reparations (including compensation) aim to repair the harm inflicted on victims.[181] By invoking *Chorzów Factory* and the IACtHR's jurisprudence, the ICC remarked that this "corresponds to the general principle of public international law that reparations should, where possible, attempt to restore the *status quo ante*".[182] Like the ICJ, the ICC stated that "the objective of reparations proceedings is remedial and not punitive. This remedial character is inherent in the modalities of reparations [including ...] compensation".[183] Provided that the person who is convicted is liable for the costs needed to repair harms caused, there is no punitive element.[184] At the ICC, applicable penalties do not include compensation.[185] Unlike the ICJ, the ICC has also invoked other goals of compensation/reparations, including deterrence and transformative justice.[186] However, the ICJ may and should expand these stated goals, especially in mass atrocity cases.

Concerning individual compensation goals, the ICC has explained that the benefit is afforded directly to an individual to repair harm suffered by him/her

176 *Armed Activities*, *supra* note 5, paras. 106, 369.
177 *Ibid.*, para. 101.
178 Shelton, *supra* note 3, 19.
179 *Armed Activities*, *supra* note 5, para. 102.
180 *Lubanga*, *supra* note 18, para. 2.
181 *Katanga*, *supra* note 68, para. 178.
182 *Ibid.*
183 *Ibid.*
184 *Ibid.*, para. 185.
185 ICC Statute, Article 77.
186 *Lubanga*, *supra* note 18, paras. 17–18, 71–72.

resulting from crimes of which the person was convicted.[187] A victim receives benefits to which he/she "is exclusively entitled", and "the benefit received is particular to the victim. Compensation paid directly into the bank account of the victim concerned would be an example of individual reparations".[188] According to the ICC, individual modes of compensation are important to victims, guarantee that victims do not feel marginalized, and enable victims to decide for themselves based on their needs and regain self-sufficiency.[189] Regarding mass atrocities, however, both individual and collective modes of compensation are arguably necessary to achieve compensation goals.

3.5 *Proof*

In ICJ compensation litigation, claim substantiation is an important hurdle for States.[190] Under the ICJ's compensation jurisprudence, "it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact".[191] In *Armed Activities*, the ICJ remarked that this rule needs to be flexibly applied, particularly when the respondent may be in a better position to establish certain facts.[192] It also determined that the standard of proof may change from case to case, depending on the gravity of the acts, and that "inferences of fact and circumstantial evidence" should be allowed when a State cannot provide direct proof of certain facts.[193] Nevertheless, compared to *Diallo*, the ICJ in *Armed Activities* relied much less on presumptions to determine certain damages, especially non-material damages. The different nature of the cases (*Diallo* concerned human rights violations against one victim) and the fact that the ICJ in *Diallo* continuously invoked IHRL jurisprudence, which largely accepts presumptions for non-material damages, may explain such a diversion.

Some authors suggest that "charges of exceptional gravity" may demand a higher standard of proof at the ICJ.[194] Concerning *compensation*-related evidence, however, this is seemingly not the case. The ICJ in *Armed Activities* referred to the DRC's evidentiary deficiencies, but it also appropriately

187 *Katanga*, *supra* note 20, para. 271.
188 *Ibid.*
189 *Ibid.*, para. 285.
190 Stoica, *supra* note 6, 143–144.
191 *Diallo*, *supra* note 13, p. 332, para. 15; *Certain Activities*, *supra* note 15, p. 26, para. 33; *Armed Activities*, *supra* note 5, para. 115.
192 *Armed Activities*, *supra* note 5, para. 116.
193 *Ibid.*, para. 120.
194 Gian-Maria Farnelli, "Consistency in the ICJ's Approach to the Standard of Proof", 21 *The Law and Practice of International Courts and Tribunals* (2022), 111, 120.

considered the extraordinary circumstances of this case that restricted the DRC's ability to produce evidence of a greater probative value.[195] By invoking the ICC's reparation jurisprudence (*Katanga*), the ICJ remarked that victims of the conflict were not always able to furnish evidence, such as hospital records and death certificates.[196] The ICJ added that, while the DRC could have obtained such documentation for a certain number of individuals, the ICJ "recognizes the difficulties in obtaining such documentation for tens of thousands of alleged victims".[197] Moreover, the ICJ noted the ICC's findings (*Ntaganda*) of widespread rape and sexual violence during the Ugandan occupation of Ituri.[198]

At the ICC, compensation claims have also encountered several evidentiary challenges. It has applied the "balance of probabilities" as the standard of proof,[199] which is considered a flexible standard.[200] Victims need to prove "the causal link between the crime and the harm suffered, based on the specific circumstances of the case".[201] The ICC acknowledges that victims face difficulties when collecting evidence in complex contexts and years after the atrocities have occurred.[202] Thus, flexible approaches to evidence on compensation are welcomed because legal certainty and equality of the parties are respected.[203]

As the ICC has found, it may rely on presumptions, but this is not unlimited and the rights of victims and the convicted must be respected.[204] It noted that the ICJ in *Legality of Use of Force* (*Serbia v. Portugal*) and *Genocide Convention* (*Bosnia and Herzegovina v. Serbia and Montenegro*) relied on "judicial presumptions", and that the IACtHR used "presumptions".[205] According to the ICC, in certain circumstances, factual presumptions allow it to presume a fact when there is no direct evidence, and a "less exacting" standard is required in reparations because access to evidence is difficult.[206] By invoking the ECtHR's

195 *Armed Activities*, *supra* note 5, para. 157.
196 *Ibid.*, para. 158.
197 *Ibid.*
198 *Ibid.*, para. 191.
199 *Lubanga*, *supra* note 18, paras. 22, 65.
200 Peter Lewis and Håkan Friman, "Reparations to Victims", in R. Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (2001), 474, 484.
201 *Lubanga*, ICC-01/04-01/06-3129, Judgment on the appeals against "Decision establishing principles to be applied to reparations", ACh, 3 March 2015, para. 81.
202 *Lubanga*, *supra* note 18, para. 22.
203 Shelton, *supra* note 3, 249–251.
204 *Katanga*, *supra* note 68, para. 75.
205 *Ibid.*
206 *Ibid.*

jurisprudence, the ICC determined that case circumstances determine the reasonableness of factual presumptions.[207]

Moreover, presumptions of certain harms may overcome certain evidentiary challenges.[208] In the ICC's jurisprudence, presumptions require the following conditions: the application of the appropriate standard considering the difficulties encountered by the applicants; the Chamber's freedom to evaluate circumstantial evidence to satisfy itself with certain facts, while remaining subject to case circumstances and evidence filed; and contextual considerations.[209]

Like the ICJ in *Diallo*, but less so in *Armed Activities*, presumptions have been used particularly for non-material damages at the ICC. By quoting the IACtHR's jurisprudence, the ICC in *Katanga* found that victims of mass atrocities are presumed to have experienced moral suffering.[210] Despite recognizing that the ECtHR, IACtHR, and UN Compensation Commission ("UNCC") render awards against States, the ICC followed *mutatis mutandis* those bodies' approaches to using presumptions and indirect evidence as proof of harm suffered.[211] The ICC accepted the IACtHR's presumption of moral harm suffered by a direct victim's close relatives.[212] According to the ICC, human rights jurisprudence does not constrain judicial discretion when assessing harm since this assessment is harm-focused and case-specific.[213]

3.6 *Damage Valuation*

In *Armed Activities*, the ICJ quantified its above-examined damage categories. Regarding loss of life, it noted the ICC's reparation jurisprudence and expert reports submitted to the ICC that found that the average amount requested by the DRC per family of victims was too high (USD 34,000) in the Congolese context).[214] However, the ICJ considered that the ICC's compensatory amount *ex aequo et bono* (USD 8,000) was insufficient for quantifying damage concerning child soldiers.[215] The ICJ examined, *inter alia*, an expert report on the Congolese judiciary's harm valuation regarding rape victims discussed by the ICC (USD 5,000 per victim).[216]

207 *Ibid.*, para. 76.
208 Dwertmann, *supra* note 7, 146.
209 *Katanga*, *supra* note 68, para. 89.
210 *Katanga*, *supra* note 20, paras. 127–129.
211 *Ibid.*, para. 57.
212 *Katanga*, *supra* note 68, para. 118.
213 *Ibid.*, para. 120.
214 *Armed Activities*, *supra* note 5, para. 163.
215 *Ibid.*, para. 205.
216 *Ibid.*, para. 192.

The ICJ referred to the exceptional circumstances in *Armed Activities* to award compensation as a global sum, within evidentiary possibilities and equitable considerations.[217] Uganda was ordered to pay the DRC USD 325,000,000, corresponding to: loss of life and other damages to persons (USD 225,000,000); damages to property (USD 40,000,000); and damage related to natural resources (USD 60,000,000).[218] Such global sum-based quantification partially resembles the ICJ's overall assessment of environmental damages in *Certain Activities* (USD 378,890.59); however, the ICJ in *Certain Activities* distinguished between damage identification and its valuation.[219] In *Diallo*, the ICJ quantified specific damage categories.[220] The different nature of the cases may partially explain this. Whereas *Diallo* corresponded to violations of one individual's rights (Guinea was awarded USD 95,000),[221] *Armed Activities* involved mass atrocities against large numbers of persons.

In agreement with Judge Yusuf[222] and Desierto,[223] however, "global sums" can be criticized because they reduce the specific harm inflicted on victims/their communities to a mere accumulation of individual harms and, other than the loss of life, the ICJ did not explain how it reached those global sums and what amounts corresponded to their components. In other words, although it relied on equitable considerations, the ICJ should have explained the meaning of equity in mass atrocities.[224]

In *Al-Mahdi*, the ICC quantified the following: damages to Timbuktu's historical/religious buildings attributable to Al-Mahdi, setting his liability at Euros 97,000; consequential economic loss (Al-Mahdi's liability: Euros 2.12 million); and moral damages (Al-Mahdi's liability: Euros 483,000).[225] Al-Mahdi's total liability was Euros 2.7 million.

In *Katanga*, the ICC quantified material, physical and psychological harm.[226] Material harm involved items attacked or destroyed, including houses, fields/harvest, and livestock (respectively USD 600, 150, and 524 for each incident). Regarding physical harm, bullet wounds were quantified (USD 250 for each incident). About psychological harm, the ICC relied on the IACtHR's case law to quantify *ex aequo et bono* losses of close and distant relatives (USD 8,000 and

217 *Ibid.*, para. 166.
218 *Ibid.*, paras. 206, 226, 258, 366, 405.
219 *Certain Activities*, *supra* note 15, pp. 37, 58–59, paras. 78, 156.
220 *Diallo*, *supra* note 13, pp. 333–344, paras. 18–57.
221 *Ibid.*, pp. 343–344, para. 56.
222 Judge Yusuf, *supra* note 26, paras. 40–42.
223 Desierto, *supra* note 5.
224 *Ibid.*
225 *Al-Mahdi*, *supra* note 20, paras. 116–134.
226 *Katanga*, *supra* note 20, paras. 190–239, 264.

4,000 respectively). Harm due to experiencing attacks was set at USD 2,000. The ICC also discussed the UNCC's practice and national practices. Out of USD 3.75 million for damages, Katanga's liability was USD 1,000,000. Yet, the ICC ordered compensation of only USD 250 per individual, totalling USD 74,250 for 297 beneficiaries. Like the other individual convicted at the ICC, this corresponded to Katanga's indigence and provision for other reparation modalities. Nevertheless, the ICC acknowledged that such an award is symbolic: it does not intend to compensate "the harm in its entirety", but only provides some relief for the harm suffered and helps "victims become financially independent".[227] Appropriately, the ICC-ACh found that the USD 250 individual awards were not a precedent.[228] The Netherlands provided donations to pay these awards to the victims.

In *Lubanga*,[229] the ICC calculated *ex aequo et bono* the harm suffered by each direct or indirect victim at USD 8,000; and it *ex aequo et bono* set the award for which Lubanga is liable at USD 10,000,000 (USD 3,400,000 regarding 425 identified victims, and USD 6,600,000 concerning potentially identifiable victims).

In *Ntaganda*, the ICC set Ntaganda's liability at USD 30,000,000.[230] This was calculated on, *inter alia*, the ICC-TFV's estimates, corresponding to physical rehabilitation, psychological rehabilitation, individual socio-economic reintegration (respectively USD 3,000, 2,000, and 3,000 per victim), etc., that concerned large numbers of victims exceeding the 2,121 victim participants in the trial: the ICC reckoned that there may have been many unidentified victims (1,100–100,000).[231] Although the ICC considered additional damages (for example, life project damages or transgenerational harm), it did not quantify them. This indicates the difficulties experienced in calculating certain damages.

To an important extent, the damage valuation methodologies and figures of the ICJ in *Armed Activities* and the ICC's case law are different, e.g., while the ICJ ordered USD 325,000,000 in *Armed Activities*, the ICC's highest liability valuation has been USD 30,000,000. Although the ICJ in *Diallo* (a human rights case) and the ICC have employed a damage-by-damage valuation, the former used global sums in *Armed Activities* (a mass atrocity case). Furthermore, while the ICJ calculates total compensatory amounts *stricto sensu*, the ICC mainly

227 *Ibid.*, para. 300.

228 *Katanga*, *supra* note 68, para. 149.

229 *Lubanga*, ICC-01/04-01/06-3379-Red-Corr-tENG, Decision Setting the Size of the Reparations Award for which Lubanga is Liable, TCh-II, 21 December 2017, paras. 259, 279–280.

230 *Ntaganda*, *supra* note 20, para. 247.

231 *Ibid.*, paras. 234–236, 246.

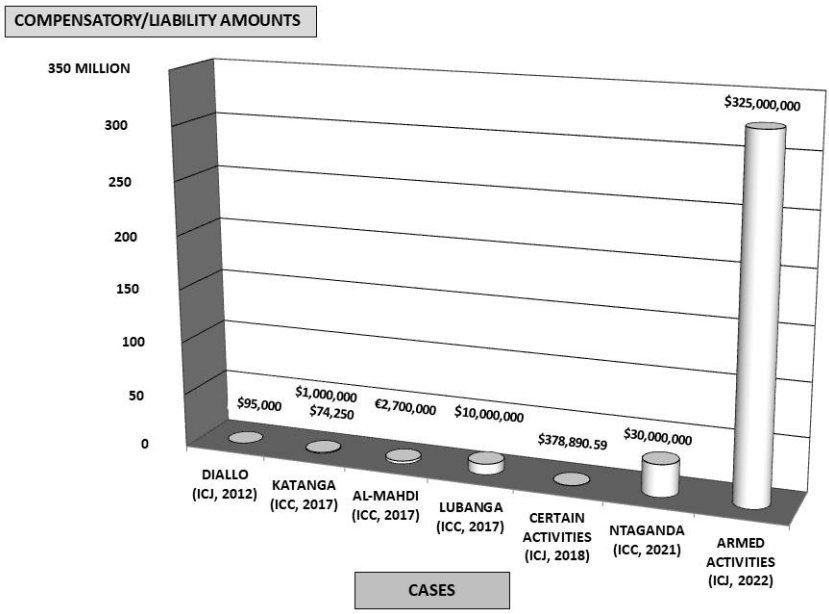

FIGURE 1 Damage valuation at the ICJ and the ICC

quantifies damages attributable to the convicted person based on his/her liability and the costs to repair, to be implemented via compensation and other reparation modalities.

Nonetheless, the practice of the ICJ and that of the ICC present important convergences, including similar considerations when calculating certain damages and the rejection of pre-determined tariffs per damage category. The difference in scope between State liability and individual liability may explain the large difference in damage quantification between *Armed Activities* and the ICC's jurisprudence. Yet, total damage valuation figures concerning mass atrocities at *both* courts have been substantially higher than those in other types of ICJ cases (human rights or environmental cases). When quantifying non-pecuniary damages, the ICJ and human rights courts have invoked "equity".[232] By relying on, *inter alia*, IHRL jurisprudence, the ICC has considered some equitable considerations. Equity may be vague; however, it is possible to identify certain factors in non-pecuniary valuation, including multiple grave violations, the wrongdoer's conduct, and intentional abuses.[233]

232 See McCarthy, *supra* note 7, 166.

233 *Ibid.*, 167–168.

4 Conclusion

Compensation applies to diverse international courts such as the ICJ and the ICC since it is a general legal category. In construing an international law of compensation for mass atrocities, the ICJ may play a fundamental role due to its status as the UN's main court as well as its proven and expected contributions to developing general international law. The ICC is crucially contributing to an international law of compensation for mass atrocities. The ICJ's *Armed Activities* compensation award and the ICC's compensation jurisprudence illustrate the feasibility and advisability of a coherent, principle-based, and human rights-oriented international law of compensation for mass atrocities. Through adapted reliance on IHRL and in coherent and principle-based manners, the international law of compensation in mass atrocity cases can and should be developed and applied in factual scenarios that both courts simultaneously examine.

Concerning compensation principles and elements, both courts may and should pay attention to each other's jurisprudence to enhance and, *mutatis mutandis*, harmonize (within their different mandates) their contributions to a coherent, principle-based, and human rights-oriented international law of compensation for mass atrocities. Despite the differences in the compensation law and practice of both courts, the violation of an international obligation (wrongful act/international crime), damages, and the causal link between them are elements common to the emerging compensation practices of both courts. There are also some similarities concerning compensation goals, damage categorisation, matters of proof, and damage valuation. All of this requires that both courts conduct an adapted use of the other court's jurisprudence, taking into consideration each court's different mandate, and refraining from making mechanical/automatic jurisprudential extrapolations.

The need for a coherent, principle-based, and human rights-oriented international law of compensation in mass atrocity cases, with dual State-individual responsibility for overlapping/the same atrocities, and IHRL sources as common applicable sources strongly justify cross-fertilization between the ICJ and ICC with regard to compensation for mass atrocities. Considering the prominence of these courts, such a process is pivotal to consolidating the international law of compensation, particularly for mass atrocities.

Finally, whether (permanent) international claims commissions should complement the work of these courts in compensation for mass atrocities can be asked. These commissions could deliver awards for large numbers of victims more expeditiously than international courts do. In *Armed Activities*,

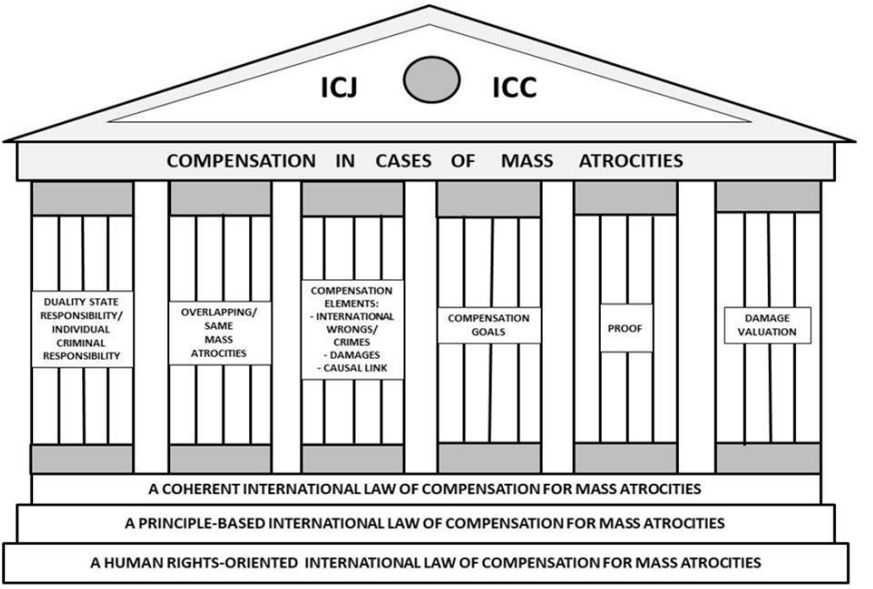

FIGURE 2 Compensation for mass atrocities at the ICJ and the ICC

the ICJ invoked the EECC's/UNCC's practices. Thus, relying on the synergetic and coordinated work of the ICJ, ICC, and other existing or potential international bodies, rather than excluding certain mechanisms, is fundamental to rendering reparative/restorative justice in mass atrocity scenarios, such as that of Ukraine where the amount of damages will be staggering,[234] totalling roughly USD 60 billion already as of April 2022 according to the World Bank.[235] Therefore, both courts should increasingly continue to contribute to developing a coherent, principle-based, and human rights-oriented international law of compensation for mass atrocities.

Acknowledgements

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234 *Genocide Convention*, *supra* note 153, *Order*, 16 March 2022.

235 https://www.reuters.com/world/world-bank-estimates-ukraine-physical-damage-roughly-60-billion-so-far-2022-04-21/.